JURISDICTIONAL LIMITATIONS UPON COMMISSION ACTION.

I.

SPEAKING generally the problem which arises in all cases where the question of the limits upon the jurisdiction of a commission is raised, is whether there is warrant of law for what is being done. To determine this is seldom as simple a matter as the reading of the statute under which the commission is purporting to act to see whether by proper interpretation sufficient authorization appears. If there is any doubt as to whether the power in question may constitutionally be conferred upon the commission, that question must carefully be considered. The action of a commission is fundamentally limited by these two possibilities — either that the legislature has not gone as far as it might in empowering the commission, or that the legislature has gone further than it constitutionally may in attempting to give the commission authority. This distinction is sometimes obscured by the canon of construction to the effect that, where a statute is apparently of such extent as to be unconstitutional, it will, if it is a possible interpretation, be confined to that scope which could constitutionally be covered. But when the legislature has gone so far as to make such an assumption impracticable, our courts will promptly exercise their traditional power of regarding as naught governmental action without constitutional power. It so happens that there have been in the Supreme Court of the United States of late years a remarkable sequence of cases concerning the jurisdictional limitations upon commission activity, most of them relating to the extent of the powers conferred upon the Interstate Commerce Commission by the Act to Regulate Commerce as amended. These cases have such importance in actual practice, in addition to the progress they indicate in administrative law, that the present paper will be primarily devoted to the discussion of their bearing upon the fundamental principles of governmental regulation.

II.

The right of the State to regulate those businesses in which the public has an interest has come down to us from time immemorial. The way in which this principle finds scope most obviously is by the action of the courts in declaring the conduct of the proprietor of the service unreasonable at the suit of the party who has been aggrieved thereby. But legislation laying down rules in first instance for the course which those who assume these callings must follow has always been regarded as due process of law, if it kept within the bounds of what is rational. All this was fully recognized in the leading case of Munn *v.* Illinois,[1] in disposing of the contention strongly urged that the power over rates was essentially judicial, and could not be exercised by the legislature. But the court in its line of argument fully justified regulation in every way that the State may employ to impose obligations. Litigation determines rights and wrongs in the past upon the basis of an existing law; legislation prescribes rules for the future as to what shall henceforth be the right and wrong in a given situation. Declaring past charges unreasonable is an act judicial in its character; fixing rates for the future on the other hand partakes of legislation. All the time it should be remembered that this is public policing of private ownership, even if it be a public calling peculiarly subject to state control. The function of the government is therefore that of regulation of the conduct of the business; the commission should not go into the management of the business by unnecessarily dictating as to the exact course which should be pursued.[2]

Once the principles upon which the obligations of those who are held to the service of the public are established, the enforcement of the law may be devolved upon a body duly established for that purpose. The laying down of the law is something that the legislature cannot delegate; but the execution of the law it almost

[1] 94 U. S. 113 (1876).

Note the limitations upon this doctrine in Lake Shore & M. S. Ry. *v.* Smith, 173 U. S. 684, 19 Sup. Ct. 565 (1899).

[2] In Bacon *v.* Boston & M. R. R., 83 Vt. 421, 77 Atl. 858 (1910), it was laid down that, although the legislature has power to provide by establishing a commission that a railroad shall discharge all its public duties, powers conferred are only those of supervisior and regulation, and not of management and administration.

necessarily gives over to the officials which it authorizes to act in the matter in question. Notwithstanding any theoretical division of the powers of government, our books have at all times been full of statutes, unquestionably valid, in which the legislature, after laying down rules and principles, has been content to leave the execution and detail to other officers. All this came to the test of the Supreme Court in the Railroad Commission Cases,[3] where the establishing by the legislature of a commission with power to fix rates was held constitutional. The requirement that the rate shall be reasonable is to be found in the law of the land which can only be modified by the process we call legislative. But the function of regulating commissions in determining and fixing reasonable rates and practices, within the principles and limitations of the substantive law governing the situation, is what we call administrative. As a matter of government it has been found, particularly of late years, that the only practicable way of enforcing the elaborated law of public service is by the creation of administrative bodies specially empowered for this particular work. Indeed with the increasing complexity of our relations the power of the legislature to act through bodies skilled to meet the exigencies of the situation as they arise has been universally recognized.[4]

The fundamental rule against delegation of legislative power remains; only it is realized that the application of the principle laid down by the legislature is simply administration. Very recently this distinction was clearly made in the Supreme Court in the case of Interstate Commerce Commission *v.* Goodrich Transit Company,[5] where the objection was raised in vain that certain orders of the commission relating to accounting created in effect new obligations not imposed by the statute. The Congress may not delegate its purely legislative power to a commission, said the Supreme Court, but having laid down the general rules of action under which a commission shall proceed it may require of that commission the application of such rules to particular situations,

[3] 116 U. S. 307, 6 Sup. Ct. 334 (1886).

See further the limitations in Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047 (1893).

[4] In the recent case of Louisiana & P. R. R. *v.* United States, 209 Fed. 244 (1913), it was pointed out that for a commission to draw up what would amount to a code applicable to a situation would be to transcend its powers, its true function being administrative, not legislative.

[5] 224 U. S. 194, 32 Sup. Ct. 436 (1912).

and the investigation of facts with a view to making orders in a particular matter within the rules laid down by Congress. In Section 20 Congress has authorized this Commission to require annual reports, and the Act itself prescribes in detail what these reports shall contain. In other words Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the power so conferred. This, as the court concluded, is not a delegation of legislative power; it is proper administration of a general statute, proceeding upon the principles therein laid down.[6]

When we come to deal with the constitutional complications due to our federal government, too wide a field is opened for anything but reference here. But such a decision as Simpson *v.* Shepard [7] goes far toward making it possible to get at the principles involved. In this Minnesota Rate Case it was laid down that for normal cases the rule was as simple as that there should be federal regulation for interstate rates and state regulation for intrastate rates. The rule may be simple, but its application is accompanied by so many computations based upon assumptions beyond the possibilities of proof as to make it all but impracticable. However, as the Supreme Court points out, whenever Congress judges that the proper regulation of interstate commerce requires that a federal commission shall have power also over the intrastate rates, by such express legislation the interstate commission may be given exclusive jurisdiction over the rate situation. Until that time comes, there is no implication from the establishing of the jurisdiction of a commission over interstate rates sufficient to take from the states the power to fix intrastate rates by such means as they may choose to employ.[8] But it

[6] The late case of Kansas City Southern Ry. *v.* United States, 231 U. S. 433, 34 Sup. Ct. 125 (1913), goes even further than the case discussed above in support of the power of the commission under this section.

[7] 230 U. S. 352, 33 Sup. Ct. 729 (1913).

[8] In Railroad Commission of Ohio *v.* Worthington, 225 U. S. 101, 32 Sup. Ct. 653 (1912), it was pointed out that, notwithstanding the fact that under the Interstate Commerce Act as it then stood the Interstate Commerce Commission had been given no power by Congress to deal with port proportional rates from a point within a state to a point of shipment within that state, the Railroad Commission of that state had in such a case where Congress had not acted, no more than in any other case, any authority which could constitutionally be given it to fix such a part of a through rate for a transit which was essentially interstate.

would not be altogether surprising in view of the strong dictum in the Minnesota Rate cases, if in some of the cases now pending in the Supreme Court it should be held that when a state commission directly interferes with the rate system established for the whole region, it may come in conflict with the federal jurisdiction as it stands to-day.

The enforcing of obligations by regulating commissions may also be attacked upon constitutional grounds when obedience to the order would result in what would virtually be confiscation. Ever since the leading case of Smyth *v.* Ames[9] it has been generally recognized that, when a rate is fixed so low as to prevent the carrier from getting a fair return upon the investment, such a rate operates in effect as a confiscation of the property invested in the business. To attempt to enforce such a rate would therefore be depriving the company of its property without due process of law. Such a rate is beyond the power of the State to put into effect, whether it is a specific rate fixed by the statute itself or a rate which a commission has sought to make under the power to fix rates confided to it.[10] This general limitation, and indeed all other constitutional restrictions upon governmental activity, rests necessarily upon any commission, limiting it in the exercise of its powers to fix rates, or to make any orders whatsoever. However sweeping the powers of the commission by the language of the act, the legislature could not authorize a subordinate body to fix rates in defiance of the rules of the Constitution any more than it could do so itself. Indeed, it would probably be said that the general power to fix rates, even stated in unqualified terms, should be interpreted in a reasonable sense as giving power only to fix such rates as the law of the land considers proper. As a matter of fact the statutes almost invariably use the qualifying phrase reasonable rates at least; and in some instances, however unwisely, the legislature lays down definite tests, such as fair returns upon property invested.

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[9] 169 U. S. 466, 18 Sup. Ct. 418 (1898).

[10] The confusing situation when a rate is established for the state as a whole specifically in a statute with the result that the legislation will be held void in its application as to railroads which cannot make a living under those rates, while remaining constitutional as to others, is not likely to arise when the fixing of the rates which the different railroads shall respectively charge is left to a commission. St. Louis & St. Ry. *v.* Gill, 156 U. S. 649, 15 Sup. Ct. 484 (1895).

One other constitutional limitation upon the regulating power should be noted. Regulation of this peculiar sort, going to the extent of compulsory service, should be confined to what may properly be considered public callings. Unless the business in question is one which is public in character it is not one which it would be due process of law to regulate to the extent of fixing its rates. And unless in the particular instance the business is being conducted upon a public basis, regulation to that extent of what is still a private affair would be equally improper. The business must be one in which the public has an interest, and at the same time one in which the proprietor has committed himself to serve the public. For the legislature, to make a general rule applicable to all concerns in certain businesses, or for a commission acting by its authority, to order that the public should be served by any particular company, unless both requisites are present, would seem to deprive the owners and proprietors of their liberty and property. At all events, we shall know more about all this when we get the decision in the Pipe Line Cases,[11] now before the Supreme Court. It is of course clear on the authorities that the operation of pipe lines such as are involved in that case is a business which is affected with a public interest. But when the proprietors have never taken anything but their own oil through these lines, or at all events never made any profession of taking oil for others, can they be said to have committed themselves to public service? A private carrier never engaged in transporting anything but his own property cannot be compelled to take goods of others, even if it is a great concern like a logging company with a railroad of its own. It is not obvious, unless weight is given to other facts in the record, how this pipe line case differs; but every case of this sort is to be decided upon its own merits.[12]

III.

This distinction between the constitutional limitations upon all administrative powers and the statutory limitations upon the

[11] 204 Fed. 798 (1913) in the court below.

[12] Where a railroad system engaged in interstate commerce controls through stock ownership a wharf company which has been chartered for the purpose of furnishing terminal facilities, the conduct of such a terminal being public in character is subject to the jurisdiction of the Interstate Commerce Commission. Southern Pacific Terminal Co. *v.* Interstate Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279 (1911).

particular commission is often obscured, but must necessarily be made in analyzing authorities. It is really a different question which arises in these two cases, and it would not be proper to cite cases decided under one branch as precedents in the other. In the case of statutory limitations the law involved is largely that of the interpretation of statutes, while in the case of constitutional limitations the possibilities of delegation of power under our constitutions is the question. In dealing with the decisions of the Supreme Court of the United States on commission control of public utilities it is particularly necessary to insist upon the distinction, so often is it ignored with such danger of confusing the principles of law involved. Fortunately the cases with which the United States Supreme Court has had to deal relating to the general matter under discussion may be divided with unusual facility into these two classes. The cases which come to the Supreme Court wherever complaint is made of illegal action by state commissions arise under the Fourteenth Amendment, and are therefore devoted to the constitutional limitations upon commission action; for the proper interpretation of a state statute is not a federal question. On the other hand, the questions which come to the Supreme Court where the power of the Interstate Commerce Commission to act has been attacked have usually been questions involving the statutory limitations of the Interstate Commerce Act, although occasionally the constitutional limits upon congressional authorization have been brought in question. These obviously are different problems; and, as will appear later, what is not confiscation of the property of a company may be a course which by fair interpretation of statutory authority it would not be reasonable to require. Such a case is Minneapolis & St. Louis Railway *v.* Minnesota,[13] where it was held that a state might without violating the Fourteenth Amendment reduce rates on a particular commodity below what was profitable, so long as the rates as a whole still produced a return which was adequate.[14]

The Supreme Court of the United States has several times

[13] 186 U. S. 257, 22 Sup. Ct. 901 (1902).

[14] See by way of contrast Pennsylvania Railroad *v.* Philadelphia Co., 220 Pa. St. 100, 68 Atl. 576 (1908), holding that to reduce passenger fares so that there was no sufficient profit left in that branch of the business was going too far, although the freight earnings were so large that the business as a whole was amply profitable.

within the past few years enumerated the various classes of cases in which it has concluded that it is its duty to set aside the action of the Interstate Commerce Commission. In Interstate Commerce Commission *v.* Illinois Central Railroad[15] the following were set forth as the grounds for taking such action. "In determining whether an order of the Commission shall be suspended or set aside, the Supreme Court must consider (a) all relevant questions of constitutional power of right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) whether, even although the order be in form within the delegated power, nevertheless, it must be treated as not embraced therein, because its authority has been manifested in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power; but (d) the Supreme Court may not, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful order upon its conception as to whether the administrative power has been wisely exercised." It will be noted that by putting (a) and (b) first in order the court emphasizes the fundamental distinction; and it then not improperly adds such working rules as (c) and (d), which might upon analysis be resolved into the elementary principles.[16]

More elaborate is the listing of the instances in which the courts will feel called upon to set aside the orders of the Commission in the recent case of Interstate Commerce Commission *v.* Union Pacific Railroad.[17] "While there has been no attempt to make an exhaustive statement of the principles involved, in cases thus far decided it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon mistake of law. But questions of fact may be involved in the deter-

[15] 215 U. S. 452, 30 Sup. Ct. 155 (1910).

[16] Under the Act a suit in the court to enjoin an order of the commission fixing charges is not confined to an ascertainment of what was determined by the commission and to a consideration of the sufficiency of the facts as determined by it to sustain the order; but on the contrary the hearing may be *de novo*, and may include the taking and consideration of evidence other than that before the commission. Missouri K. & T. Ry. Co. *v.* Interstate Commerce Commission, 164 Fed. 645 (1908).

[17] 222 U. S. 541, 32 Sup. Ct. 108 (1912).

mination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority there involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power." [18]

Recourse to the courts to settle these questions is itself governed by these principles. The vindication of the constitutional securities of those whose rights have been invaded cannot be withdrawn from the courts, nor can the power to say whether the coercion in question is without warrant of law. Even without a provision in the legislation for the determination by the judiciary of the question whether the authorities have exceeded their powers, the courts will give appropriate relief to a plaintiff whose rights are being invaded by public officers acting beyond their real authority. But whether there shall be anything in the nature of an appeal on the facts from the judgment of the commission, and the extent of that right, is altogether a question of what statutory provision has been made therefor. In the case of the Interstate Commerce Commission, Congress has left to the judgment of that body upon the facts before it about as much finality as is constitutionally possible, as was pointed out recently in Atchison, Topeka & Santa Fe Railway *v.* United States.[19] But examination of the facts which are material to the controversy is so indispensable in any justiciable question that the federal courts often seem to be reviewing the discretion of the Commission as to facts, when they are in reality only keeping it within the laws.[20]

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[18] Where the commission orders carriers to desist from according different rates to coal intended for the use of railroads than to commercial coal, and the facts, circumstances and conditions upon which it bases its orders are undisputed, and the question involved is the construction of the pertinent sections of the Act to determine whether the different charges constitute violations of those sections, the order is not merely administrative and is open to review by the courts. Interstate Commerce Commission *v.* Baltimore & O. R. R. Co., 225 U. S. 326, 32 Sup. Ct. 742 (1912).

[19] 232 U. S. 199, 34 Sup. Ct. 291 (1914).

[20] It is competent for the legislature to provide that the burden of proof shall be

It should be noted in this connection that no case of invasion of rights secured by the Constitution arises when the Commission dismisses by an adverse decision a shipper who is complaining that rates charged him are more than he should be obliged to pay. As has just been seen, where a carrier is subjected to regulation to the extent of being obliged to serve at less than a fair return, it is being subjected to unconstitutional deprivations. But unlike the carrier who must serve all at the rate established by law, the shipper is not obliged to ship unless he wishes, and his property is not therefore taken from him by compulsory process in the view of the law. This doctrine that, whereas a carrier has constitutional rights to attack the decision of a commission, the shipper only has such statutory rights as may be provided, is shown in the recent case of Hooker *v.* Knapp.[21] That case held that, as the system of procedure provided by the Interstate Commerce Act contained no provision for appeal by a party whose complaint had been dismissed by the Interstate Commerce Commission, he had no right whatever, as he had no basis for recourse to the courts upon the ground that he could not earn a livelihood shipping at the rates upon the existing basis.[22] This decision is quite consistent with the theory of administration underlying our system at present. If the body duly charged with seeing that only such rates are charged as are reasonable decides that the interests of the public are protected, why should anybody have any standing to go to the courts about it any more than for any other difference of opinion as to matters of government?

When, therefore, the provisions which Congress has made show plainly enough that the jurisdiction of the Commission was designed to be exclusive, that will be the end of cognizance of such matters before any other tribunal, — otherwise than has just been described, by recourse to the proper court, to set the order of the Commission aside as in excess of jurisdiction. How far the

upon those seeking to set aside the action of the commission as unreasonable; but to declare that the findings of the commission shall be taken as conclusive evidence of what is reasonable in the premises would be withdrawing ultimate rights from judicial inquiry, which cannot constitutionally be done. Richmond & D. R. R. *v.* Tramwell, 53 Fed. 196 (1892).

[21] 225 U. S. 302, 32 Sup. Ct. 769 (1912).

[22] In the opinion in Proctor-Gamble & Co. *v.* United States, 225 U. S. 282, 32 Sup. Ct. 761 (1912), the bases for this doctrine were first stated.

courts will go in working out such intent is seen in the leading case of Texas & Pacific Railway *v.* Abilene Cotton Oil Company,[23] where it was held that, as to wrongs done shippers for which redress was provided by the processes of the Commission, no suit could be brought elsewhere in any court. If a shipper is ready to prove that the rate charged him was outrageously high he can no longer, as formerly, litigate the matter in the courts, and show that the established rate is unreasonable. He must go to the Commission to get the scheduled rate set aside, and reparation awarded him for the extortion. Indeed, the theory is that the scheduled rate is the only legal rate until thus altered; and this has had the startling result of compelling shippers to pay the scheduled rate, even when a lower rate was quoted them.[24] Whatever is duly confided to the jurisdiction of a commission is thus automatically withdrawn from the cognizance of the courts as an original question.

IV.

The general scope of the jurisdiction of a commission is usually plain enough; it is the application of these principles to the facts which makes the difficulties. As to the matters placed within the jurisdiction of a commission to regulate, these may ordinarily be determined by an examination of the statute itself. Over what callings a commission has jurisdiction can usually be stated by simply reading the act. There was no basis upon which the Interstate Commerce Commission could have pretended to have power over telephones until its jurisdiction was extended to this

[23] 204 U. S. 426, 27 Sup. Ct. 350 (1907).

In Robinson *v.* Baltimore & O. Ry., 222 U. S. 506, 32 Sup. Ct. 113 (1912), it was held that no action based upon a complaint of discrimination resulting from the enforcement of schedules in effect could be brought in the courts, exclusive jurisdiction to reform such schedules as might be thought to be discriminatory having been given to the commission, together with the secondary relief of private reparation for damages caused by the past enforcement of such schedules.

[24] Texas & P. Ry. *v.* Mugg, 202 U. S. 242, 26 Sup. Ct. 242 (1906), is the case most often discussed in this connection.

Since the commission now has power to suspend the taking effect of rates filed with it, it would seem that the courts have no power to enjoin the filing of a schedule of rates under a bill brought prior to the date of filing of the tariffs, since the commission has exclusive jurisdiction of determining all questions of reasonableness with respect to rates. Columbus Iron & Steel Co. *v.* Kanawha & M. Ry. Co., 171 Fed. 713 (1909).

service by the recent amendment. But there are always outstanding doubts as to what jurisdiction has been given to the Interstate Commerce Commission by the various clauses of the Act to Regulate Commerce with its successive amendments. It was not until the recent decision of the Supreme Court in Omaha & Council Bluffs Street Railway *v.* Interstate Commerce Commission,[25] that it was settled that Congress, by putting interstate transportation by railroad companies under the jurisdiction of the commission, had not intended to include a street railway running over an interstate bridge. To what extent the commission has power to go in regulating the businesses upon its list may also usually be discovered without difficulty by consulting the statute. Thus it would not occur to anyone that, as the Act to Regulate Commerce now stands, a railroad company would have to get permission from the Interstate Commerce Commission for the making of a bond issue.[26] Nevertheless there are many questions as to the conditions upon which the powers apparently granted to the commission may be exercised, as will be seen presently.

Sometimes it is easy to see the limitations which the statute imposes upon the action of the commission; at other times it is difficult. Where there are explicit clauses plainly stating the powers conferred, it would seem that there ought to be no hesitation in keeping the commission within the law. If the legislature has judged it wise to confine the activity of the commission within bounds which it has fixed, there is nothing for the courts to do except to insist that the commission takes no action beyond these limits. Whether the court thinks that the policy of the legislature in thus limiting the scope of the work of the commission is wise or not should make no difference. It is a question of holding the commission to the limitations set upon it for better or worse. On the other hand, if the legislature by true intendment has said that the jurisdiction of the commission shall go to certain lengths, it is not for the commission to cut down the scope of the act by im-

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[25] 230 U. S. 324, 33 Sup. Ct. 890 (1913).

[26] A case similar in character involving simply the interpretation of the scope of the phraseology of the Act is Interstate Commerce Commission *v.* Humbolt S. S. Co., 224 U. S. 474, 32 Sup. Ct. 556 (1912), where the court ordered the commission to take cognizance of matters relating to carriage in Alaska, on the ground that the district was sufficiently described by the word territory.

posing limitations of its own upon the extent of the legislation. The commission as an administrative body is there to enforce the law; thus far it may go and no further. It is all a question of getting at the true intent of the legislative provisions by proper interpretation. Thus, in Interstate Commerce Commission *v.* Delaware, Lackawanna & Western Railway,[27] it was held, in view of certain canons of statutory interpretation peculiarly applicable to the case, that forwarders collecting goods of others were as much within the Act as other shippers, and could not be refused car-load rates enjoyed by others.[28]

Where the conditions are explicit there is no excuse for taking action without warrant of law. It is only where the phraseology is capable of various interpretations that the court has any scope for those canons which teach us to construe legislation of this sort as liberally as one may in order to effect the objects which the legislature seems to have had in mind. A good example of the enforcement of the statute as it stood is the case of Interstate Commerce Commission *v.* Delaware, Lackawanna & Western Railway,[29] where the power of the Interstate Commerce Commission under Section 1 of the Act to Regulate Commerce was brought to question. By the reading of that part of the section it appeared that shippers who were prejudiced by lack of shipping facilities could go to the Commission for an order for the establishment of a switch connection with the railroad system. The applicant in this particular case was not a shipper, but the owner of a branch line desirous of establishing business relations. The court spoke sharply on this point of confining the power of the Commission to the Act.[30] The statute provides the only remedy which Congress had in mind, it said. It stands as the law, and must be accepted as the

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[27] 220 U. S. 235, 31 Sup. Ct. 392 (1911).

[28] The right to reparation being secured to shippers for two years by the Act, the commission cannot qualify that right by barring a complainant for laches within that time, or by demanding that the proof shall be conclusive. Thompson Lumber Co. *v.* Interstate Commerce Commission, 193 Fed. 682 (1910).

[29] 216 U. S. 531, 30 Sup. Ct. 415 (1910).

[30] Not only may the commission not give relief to complainants who have no rights under the Act, but it cannot entertain complaints for wrongs not covered by the Act. See Pittsburgh C. C. & St. L. Ry. *v.* Knox, 177 Ind. 344, 98 N. E. 295 (1912), holding that the Commission has no jurisdiction under the Act over suits by shippers to recover damages caused by delays in transportation.

limit of the Commission's power. Congress was not giving any rights to other roads; nor was it subjecting one railroad system to demands of another.

A similar case — Interstate Commerce Commission *v.* Northern Pacific Railway[31] — decided the same term, gave the court more difficulty. Section 15 of the Act as it stood provided that the Commission might establish through routes and joint rates provided no reasonable or satisfactory through route existed. The Commission ordered a new through route between termini, where another through route had already been established. The Commission had decided upon grounds sufficient to itself that the existing route was not a reasonable or satisfactory one, and directed the establishment of another route, involving, a short hauling for the railroad which had formerly had the long haul. That railroad thereupon took the case to the courts, demanding that it should be determined by judicial inquiry whether the existing route was really reasonable or satisfactory. Unless this jurisdictional fact was established the railroad contended that the Commission, under the Act, had no authority to take any action whatsoever in relation to the establishment of joint rates. The Supreme Court held to the position taken in the previous case that the limitations in the Act must be respected. It was urged on behalf of the Commission that this condition was addressed only to the discretion of the Commission itself, and could not be examined by the courts independently as a fact. The court admitted that the difficulty of distinguishing between a rule of law for the guidance of a tribunal and a limit set to its power is sometimes considerable. But it said that the condition in the Act is not to be trifled away; and there seemed to be no reason for not taking the proviso of the Act in its natural sense. The Commission, therefore, was held to have no power to order a new route, since it appeared that the court below had properly found the existing route reasonable.[32]

That a commission cannot of its own motion impose conditions

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[31] 216 U. S. 538, 30 Sup. Ct. 155 (1910).

[32] In the case of Southern Pacific Ry. *v.* Interstate Commerce Commission, 200 U. S. 536, 26 Sup. Ct. 330 (1906), it had been held that in the absence of provisions in the Act giving the commission power, carriers could not be forbidden from following the practice of reserving in quoting a through rate the right to designate the connection which should be employed.

upon the exercise of its powers where no conditions exist would seem to be equally plain. If no limitations have been laid down for the action of the commission, it cannot add to these requirements others of its own, failing which it will refuse to go forward with its duty of carrying the law into effect. There have not been any cases especially significant where the Interstate Commerce Commission has mistaken its functions so far as to attempt to impose conditions upon the exercise of its powers where Congress has set none. In some of the states, however, the commissions in regard to certain powers, notably in the case of permitting the issuance of securities by the corporations subject to its jurisdiction, have boldly specified the conditions upon which obtaining favorable action would depend. As the Interstate Commerce Commission is likely very soon to get some measure of power over the issue of securities, it may be well to go out of the line of decisions which is being followed to call attention to those New York cases, such as People ex rel. Binghampton Light, Heat and Power Company *v.* Stevens,[33] where it was held that the commission had no power to permit an issue of securities upon condition that certain outstanding stock of the utility should be canceled, but could simply determine whether the proposed issue of stock was in accordance with the statute.[34]

For a commission to tamper with a statute either by extending its scope or by contracting its provisions would be legislation and not administration. Just as the commission has no excluding power by which it can make the statute less than it is, so it has no expanding power by which it can make the statute more extensive. A commission cannot make that lawful which the statute makes unlawful, nor make unlawful that which the law does not condemn. There is no dispensing power in our governmental system which can be confided to administrative bodies where rights of person or property are so involved as they are in the regulation of the conduct of those who devote their property to public service. Here again the Interstate Commerce Commission has never sought to so exalt its functions; but apparently this has happened once at least in the case of a state commission. At all events, there is

[33] 203 N. Y. 22, 96 N. E. 114 (1910).

[34] See to the same effect Fall River Gas Co. *v.* Board of Commissioners, 214 Mass. 529, 102 N. E. 475 (1913).

the case of Railway Commission *v.* Galveston Chamber of Commerce,[35] holding that a state railroad commission cannot authorize railroads to disregard the provisions of the statute prohibiting unjust discrimination in charges for similar service.[36]

V.

From the beginning of federal regulation of interstate carriers to the present time the sound theory upon which that supervision has proceeded has been that the primary right to conduct its business remains with the carrier, the commission having secondary power to take action when revision is called for. Under the original Interstate Commerce Act the power of the Commission to give relief from unreasonable charges was held by the Supreme Court in Interstate Commerce Commission *v.* Texas Pacific Railway[37] to go no further than to declare the existing rate unreasonable. But by the amendments of 1906 the Commission was given the further power, after finding the rate which was being charged unreasonable, to fix a reasonable rate for the future.[38] It should be noted that important as that amendment was it did not change the fundamentals of the situation. The carrier still retains the right to make its rates, the Commission having power only to set them aside under the conditions named in the Act. As to the constitutionality of the Act as amended, there would seem to be no doubt, as it has repeatedly held that such power — even in the more extreme form of establishing rates and making schedules — may be given over to a commission by the legislature. At all events the only question which has been seriously litigated under the Interstate Commerce Act is the extent to which limitations are imposed upon the Interstate Commerce Commission.

The process provided by the Act in accordance with the prin-

[35] 51 Tex. Civ. App. 476, 115 S. W. 94 (1908).

[36] A commission can neither add to nor subtract from the legislation which it is administering. See Mayo *v.* Western Union Telegraph Co., 112 N. C. 343, 16 S. E. 1006 (1893), holding that a commission cannot prescribe other rules than those in the Act.

[37] 167 U. S. 479, 17 Sup. Ct. 896 (1897).

[38] Likewise the commission has always had authority to order a railroad to so adjust its rates as to prevent discrimination against a shipper without prescribing the new rates to be applied, or specifying how the charges should be equalized. New York Central & H. R. R. Co. *v.* Interstate Commerce Commission, 168 Fed. 131 (1909).

ciples under discussion is the measure of the authority of the Commission. The Commission cannot take action affecting the charges of a carrier except upon the basis of a hearing and a finding upon the evidence that the rate being charged is unreasonable. Not until such a finding has been made has the Commission, as the Act reads, any jurisdiction to take any further action. The power of the Commission to alter rates depends altogether upon the fact of their unreasonableness, and in the absence of evidence to that effect the Commission has no authority. All this may not have been so plain in regard to this amendment at the outset as it has become subsequently in the light of the decisions interpreting it. But by the time that the case of Interstate Commerce Commission *v.* Stickney[39] was decided it had become clear enough that a carrier under Section 15 as amended was entitled to a finding by the Commission that the particular charge complained of was unreasonable before a change could be required.[40] Moreover, as that case held, a charge for a service which did not give the carrier more than a fair profit for performing it, was not unreasonable. For the Commission to attempt to fix a new rate at the out of pocket cost in place of the existing rate which included a profit upon the service performed, was therefore altogether beyond the statutory limitations upon the power of the Commission. Probably, however, this would not be an invasion of constitutional rights, since the profits of the company taken as a whole apparently remained sufficient.

The duty of the Commission is not that of a lawmaker laying down such rules of public policy as it may think will promote the common weal. Its function is to see whether the rates which the carrier is charging are in accordance with the requirements of law laid down in the Act and, if they are not, to make them so. As was insisted in Interstate Commerce Commission *v.* Chicago, Rock Island and Pacific Railway,[41] this determination is for the Commission in first instance, the power of the courts being confined to discovering whether the action of the Commission is within the scope of the delegated authority under which it purports to have

[39] 215 U. S. 98, 30 Sup. Ct. 66 (1910).

[40] It should be noted that the commission has no power under the Act to fix minimum rates for the protection of a competitor; its jurisdiction is confined to fixing maximum rates for the carriers involved in the proceedings before it. See Norfolk & W. R. R., 195 Fed. 953 (1910).

[41] 218 U. S. 88, 30 Sup. Ct. 651 (1910).

been made. The question in that particular case was a close one, as the Commission had obviously certain policies of rate-making in mind in dealing with basing points which inevitably involve the respective position of trade centers. The carriers complained to the courts that, by the artificial apportionments made, the Commission was laying an arbitrary hand upon the traffic of the country. But the Supreme Court decided that there was enough in the record to satisfy it that the rates set aside were unreasonable, and that the rates put in their place were proper. The Court was divided however; and it was obvious that further discussion of the whole matter would soon be required. It is all very well to say, as the majority did, that commissions must have a broad outlook; [42] but the question is by what rules are they to act if we are to have a government of laws, not of men.

The significance of the limitations in the Act as amended was probably not brought to the attention of the country until the case of the Southern Pacific *v.* Interstate Commerce Commission.[43] The Commission, as it appeared in that case, had come to the rescue of the lumber industry of the Willamette valley, which was threatened by advances in rates which had been put into effect shortly before. At all events, it had after due proceedings fixed lower rates for the future in place of the old rates, apparently upon the ground that it would be a wise policy to keep open the markets which had thus been closed. The earlier rates undoubtedly had thus created markets upon which the shippers had come to rely; but, as the Supreme Court pointed out, all these arguments ignored the provisions of the Act. In the absence of a finding that the advanced rates which carriers had put in effect were unreasonable, the Commission had no jurisdiction to go further; and this was not

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[42] In a few states the courts have apparently adopted the theory of the economists, that a railroad should so fix its rates as to equalize the advantages of its patrons in so far as this will be for the good of the country. In State *v.* Minneapolis & St. L. Ry., 80 Minn. 191, 83 N. W. 60 (1900), it was held that a commission in fixing rates might act upon the business policies which the railroads themselves have been accustomed to pursue in making rates. And in Southern Ry. *v.* Atlanta Stove Works, 128 Ga. 207, 57 S. E. 429 (1907), it was held that a commission is not precluded from the consideration of economic conditions potentially influencing freight charges. This is little different from the rule of charging what the traffic will bear, which means fixing rates without any basis in law.

[43] 219 U. S. 433, 31 Sup. Ct. 288 (1911).

made out by showing that public interests would be promoted by lower rates.[44] Such arguments might sometimes avail carriers in explaining differentials; but they could not justify commissions in ordering changes.

What is a reasonable rate is a matter as to which our modern law has some ideas, although they are by no means as clear as they soon will be with the development now going on so rapidly in this branch of the law. We are at a point where progress can at least be made in this matter, with the famous case of Interstate Commerce Commission *v.* Atchison, Topeka, Santa Fé Railway at last brought to a termination by the late affirmation of the Supreme Court.[45] This matter of the Lemon rates from the Pacific coast has been going back and forth between the Commission and the courts for some time. First, the Commission reduced the rates for reasons in last analysis more economic than legal; and this order the Commerce Court set aside, as the existing rate had not been sufficiently shown to be unreasonable in the sense of the law. Then the Commission took further testimony, making at least a showing sufficient to justify it in declaring the existing rates unreasonable, and substituted new rates; and the federal court then held in effect that whatever motive might be behind this action there was reason enough apparent in the record for the course it had pursued.[46] And indeed this final action is good administration, quite in accordance with the distinction between the motives for taking action at a particular time and the basis upon which that action is

[44] The general principle which the majority of courts are now laying down as the guide for all concerned seems to be that what is a reasonable rate depends upon the significance of that phrase at common law. Southern Indiana R. R. *v.* Railroad Commission, 172 Ind. 113 (1910). The question then is what, in view of all the facts affecting the movement of a commodity, is the amount which a carrier should obtain to recoup itself fully for the service it is rendering, having in mind the property it is employing in performing the transportation. Morgans L. & T. R. R. & S. S. Co. *v.* Railroad Commission, 127 La. 635 (1911).

[45] 231 U. S. 736, 34 Sup. Ct. 316 (1913).

[46] It should be said that the basing of rates upon what is economically desirable has never been the test of the federal courts in reviewing the orders of the Interstate Commerce Commission in relation to rates. Philadelphia & R. Ry. *v.* Interstate Commerce Commission, 174 Fed. 687 (1909). On the contrary, the courts have always insisted that the commission shall keep itself to the basis of the conditions affecting the movement of traffic as the standard established by the laws for the reasonableness of rates. Interstate Commerce Commission *v.* Delaware L. & W. Ry., 64 Fed. 723 (1896).

founded. To what it will devote its efforts at any given time is a matter of administrative discretion; but what it may then do is a matter of jurisdictional limitation.

Nothing is more difficult to bring within these requirements than the issues raised in the Intermountain Case which has recently been argued before the Supreme Court.[47] There is a long history back of the case which it is difficult to summarize in brief compass. Under Section 4 as it originally stood, the United States Supreme Court held in East Tennessee, Virginia & Georgia Railway *v.* Interstate Commerce Commission[48] that competition existing at the distant point while there was no competition at the intermediate point constituted a circumstance so dissimilar as to justify charging more for the short haul than for the long without getting permission from the Commission. As amended in 1910, jurisdiction to pass upon those cases where the carrier was charging more for the short haul than for the longer distance was unequivocally conferred upon the Commission. The Commission thereupon made some general orders as to the relation to be observed between the Intermountain rates and those to the Pacific coast. The railroads are contending that this is going beyond limits of the administrative function into the realm of arbitrary power. Whether this is so or not depends upon whether the Commission may be said to be basing its action upon principles of law applicable to the case. We cannot leave to a commission, any more than to the railroad itself, the power to build up communities or destroy them at its own whim or caprice. We must have here as elsewhere principles of law as to what things in the movement of traffic are of such weight as to determine the reasonableness of the rate charged. However, as to this particular

[47] 191 Fed. 856 (1913), in the courts below.

[48] 181 U. S. 1, 21 Sup. Ct. 516 (1901). Ever since this decision of the Supreme Court to the effect that competition created such a dissimilarity of circumstance as to justify a disproportion in rates, there has been a constant tendency to narrow the scope of that holding. At the present moment the law on this point seems to be in the unsatisfactory state that although a carrier may still justify itself in making its rates on this basis, the commission should not assume the power to compel the making of such differentials. Even so the law is becoming insistent that the decision shall not be interpreted as giving the carrier arbitrary power to divert traffic by special rates even when it is for its business advantage to keep business to its own lines by so doing. Interstate Commerce Commission *v.* Louisville & N. Ry., 118 Fed. 613 (1902).

matter it may be that the principle that, when competition is found in cases like these, the rate may be reduced sufficiently to meet it, has been so incorporated into the law governing this situation that all that is left to the Commission to do is to permit such reductions wherever it finds competition.

VI.

Thus stands at present the jurisdiction of the Interstate Commerce Commission over rates. Under the Act the carrier retains the primary right to make rates; but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and fix for the future that rate which it regards as reasonable. Therefore, unless there is evidence before the Commission to show that the rates attacked were unreasonable, there is no jurisdiction to proceed further. To be sure, the courts will not review conclusions of fact by passing upon conflicting testimony. But the legal effect of evidence is a question of law; and a finding without evidence is beyond the power of any commission. The value of evidence varies, and the weight to be given to it is peculiarly for the commission. Notwithstanding this, a finding without evidence of any sufficient character is a nullity, as is said in Atlantic Coast Line *v.* Interstate Commerce Commission.[49] Such authority cannot be granted to any body, even if Congress could be conceived of as so designing. To confide such power to a commission would be inconsistent with the fundamental principles of justice and an exercise of arbitrary power condemned by the Constitution.[50]

Whether the circumstances of the exercise of the power to give orders are such as conduce to justice may therefore be the subject of inquiry by the courts. In the late case of Interstate Commerce Commission *v.* Louisville & Nashville Railroad,[51] the Supreme

[49] 194 Fed. 449 (1912).

[50] In a petition to the Circuit Court to enforce an order of the commission before the judge sitting without a jury, the full report of the commission, containing a commingled statement of opinion drawn from the facts and of conclusions of law, as well as of the facts themselves, was admitted in evidence, complainant stating to the court the nature of said report and offering it in evidence in so far as the facts therein contained were material or competent. The court held the admission of said report was not prejudicial on the ground that it included the extraneous opinions and conclusions of the commission. Chicago, B. & Q. R. R. Co. *v.* Feintuch, 191 Fed. 482.

[51] 227 U. S. 88, 33 Sup. Ct. 185 (1913).

Court pointed out that this could always be done, as the questions raised were in a true sense justiciable. Whether the order deprives the carrier of a constitutional or statutory right, said the Court, and whether the hearing was adequate and fair, are all matters within the scope of the judicial power. In the comparatively few cases in which such questions have arisen the Court pointed out [52] that it has invariably been recognized that administrative orders quasi-judicial in character are void — (1) if a hearing was denied; (2) if although granted it was inadequate or manifestly unfair; (3) if the finding was contrary to the indisputable character of the evidence; (4) or if the facts found do not as a matter of law support the order made. This is one of the most important of the recent cases upon this subject in the Supreme Court, and it will well repay careful reading.

This means that in order to have what may pass as due process of law there cannot be substantial disregard of our ancient traditions. The commission is an administrative body essentially, not bound necessarily to the technique of judicial tribunals. As was held in Interstate Commerce Commission *v.* Baird [53] it is not limited to the strict rules as to the admissibility of evidence which prevail in suits between private parties. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve those essentials of action in accordance with evidence adduced by which rights have immemorably been asserted or defended. The Commission is not justified in condemning rates and making revisions upon mere impressions and comparisons, but may act only upon facts and conditions duly established. In this light the right to a hearing which the Act provides must be fully protected.[54] Manifestly there is no hearing in any true sense

[52] Citing along with various cases discussed in this article. Atlantic C. L. Ry. *v.* North Carolina Corp. Comm., 206 U. S. 1, 27 Sup. Ct. 585 (1907); and Wisconsin M. & P. R. *v.* Jacobson, 179 U. S. 287, 21 Sup. Ct. 115 (1900).

[53] 194 U. S. 25, 24 Sup. Ct. 563 (1912).

[54] The primary purpose of the Interstate Commerce Act is to regulate interstate business of carriers, and the secondary purpose, that for which the commission was established, to enforce the regulations enacted by it, and the power to require testimony is limited, as is usual in English-speaking countries, to investigations concerning a specific breach of the existing law; this power is not extended to mere investigations by provisions in any of the amendatory acts in regard to annual reports of interstate carriers, or of the commission, or for the purpose of recommending legislation. Harriman *v.* Interstate Commerce Commission, 211 U. S. 407, 29 Sup. Ct. 115 (1908).

unless the party knows what evidence is offered or considered, and is given opportunity to explain and refute it. This is not merely a matter of proper construction of the Act, it is a right which comes from the Constitution itself.

This argument was brought out fully in the Supreme Court recently where the contention was made that the findings and orders of the commission under Section 15 might be originally supported and subsequently defended by information which the commission had gathered under Section 12 for general purposes. But the Supreme Court would have none of this where the rights of parties were involved. When the point was raised apparently for the first time in United States *v.* Baltimore & Ohio Southwestern Railroad,[55] there was no question about the attitude of the Supreme Court. The Supreme Court is now plainly insistent that all parties before the Commission in any proceedings directed against them must be fully apprised of the evidence submitted or to be considered and must be given opportunity to cross-examine witnesses and to inspect documents and to offer evidence in explanation and rebuttal. In no other way consistently with what we consider the course of the administration of justice can a party maintain its rights or make out its defense. Moreover, as the Supreme Court has keenly appreciated, in no other way can the courts inquire as to the existence of evidence upon which the finding might be based; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient, information to support the finding.[56]

These are substantial rights that are thus jealously protected. It does not mean here or elsewhere that an administrative body is held to the rigorous limitations of a judicial tribunal. The case of Cincinnati, Hamilton & Dayton Railroad *v.* Interstate Commerce Commission [57] is still good law, although by its doctrine the com-

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[55] 226 U. S. 14, 33 Sup. Ct. 5 (1912).

[56] It should be noted however that within the range of its discretion in determining the reasonableness of rates it is entitled to select the testimony which it will rely upon according as it addresses itself to the discriminating judgment of the commission. Louisville & N. R. R. *v.* Interstate Commerce Commission, 195 Fed. 541 (1912).

[57] 206 U. S. 142, 27 Sup. Ct. 648 (1907).

mission is not confined to taking action responsive to the pleadings with which the proceedings were originally begun. It was held in that case that the Interstate Commerce Commission, in making an investigation on complaint of a shipper, has in the public interest the power, disembarrassed by any supposed admissions contained in the statement of the complaint, to consider the whole subject and the operation of the new classification complained of in the entire territory. If the Commission finds a new classification of rates engenders discrimination it has power on its own motion to prohibit the further enforcement of the same. A commission, in other words, has combined in its constitution two functions; as administrative body it may institute proceedings, but it passes upon the matters thus brought before it quasi-judicially.[58]

Some object to the loss of efficiency in administration by not having the knowledge which the Commission has accumulated in other proceedings available in all. Of what use, it is said, will be the having of an expert body intrusted with this work unless we can use at all times their special knowledge. But as a practical matter the difficulties of conforming to these requirements are not great. If the Commission takes care as it now does to have read into the record the documents it wishes, if it puts forward for examination the investigators it has used, the requirements are observed. Nobody objects to any commission using its expertness in dealing with the facts in the record; the objection would be to the commission giving judgment on evidence locked within themselves. All this is inconsistent with our notions of justice; by discretion we mean a judgment controlled by principles of law, as was said in Nashville Grain Exchange *v.* United States.[59] We are not content in modern times with the sort of equity which the Chancellor originally evolved from his inner consciousness to deal with each case as it came before him. Still less will any people with the traditions of

[58] It should be added that it is provided in some of the commission acts of late that only the evidence which is in the record before the commission can be produced in proceedings in the courts to set aside the action of the commission, and that newly discovered matter must be brought before the commission by reopening the case; and it has been held that this exclusion of further evidence on these conditions is not depriving the parties of their right to get in all their evidence, and is therefore due process of law. Oregon R. & Nav. Co. *v.* Fairchild, 224 U. S. 510, 32 Sup. Ct. 535 (1912).

[59] 191 Fed. 37 (1912).

our race rest under proceedings of the order of the Star Chamber without being confronted with testimony against them.[60]

VII.

These decisions mean that as a people we will not be content to have our rights determined by administrative fiat; we demand reasoned judgment based upon ascertained principles generally understood. If the Commission is to be held to its function of administrating the law, we must have some basis for determining the meaning of the word reasonable used in the Act. The Commission, as it has been seen, can only set aside a rate if it is unreasonable; in its place it can only fix a rate which is reasonable. But how is it to be determined what rates are unreasonable and what change would make them reasonable, unless we have definite principles universally recognized? The Interstate Commerce Commission itself has made noteworthy progress in the past few years in establishing by its decisions the bases upon which the reasonableness of rates depend as a matter of law. The Supreme Court has also of late years been giving the stamp of its approval to rules for the determination of the reasonableness of rates which seem at last to be practicable. Vague though a phrase in a statute may apparently be, yet it may well have a definite meaning in the law; and by the prevailing rule, when a given phrase has an accepted significance at common law, it should be taken in that sense. We must have some objective standard to go upon, or we have no security from subjective differences. What is reasonable according to principles of law governing the matter is what we must insist upon in order to confine our commissions to administration. If we have nothing to rely upon except what seems upon the whole to the body in power desirable or impolitic, we can hope for nothing better than benevolent despotism subject to all the corresponding risks of arbitrary power.

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[60] As a final illustration of the extensive operation of the fundamental principles under discussion, the case of State *v.* Great Northern Ry., 100 Minn. 445, 111 N. W. 289 (1907), may be taken. It was held in that case that for the legislature to leave to a commission the power to pass upon the issuance of securities without giving it any rules to guide it in its action was an unconstitutional delegation of power.